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**JOHN LEE BERRY, III**

UNITED STATES DISTRICT COURT

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

SAN FRANCISCO

13 UNITED STATES OF AMERICA,  
14  
15 Plaintiff,  
16  
17 vs.  
18  
19 JOHN LEE BERRY, III,  
20 Defendant.

Case No. CR 14-582 JD

**DEFENDANT'S SENTENCING  
MEMORANDUM**

Date: April 26, 2017

Time: 10:30 a.m.

Court: The Hon. James Donato

## 1. INTRODUCTION

John Berry's conduct was the result of desperation as he tried to support his wife and young children any way he could during a time of severe financial crisis. He was groomed by co-defendant Alvin Florida to act as an agent and proxy solely for Florida's interests and benefit. His employment for co-defendant Florida was little more than that of a day laborer. Trial testimony and evidence established six very significant facts:

1. John Berry is Alvin Florida's son-in-law;

- 1           2. John Berry was Alvin Florida's employee;
- 2           3. John Berry had no independent decision-making powers at the auctions;
- 3           4. John Berry acted on behalf of Alvin Florida's business interests and
- 4           his client's interests;
- 5           5. John Berry received no compensation from any of the pay-outs
- 6           from the rounds held subsequent to the auctions; and
- 7           6. John Berry took no ownership interest in any of the properties of
- 8           interest in this case.

9           John Berry supports a family of five including his wife and 3 children. Despite being  
10 subject to prosecution in this case he maintained gainful employment since 2013 in an effort to  
11 provide for his family. His employers are well aware of the current situation and are still  
12 willing to afford him the ability to make an honest living and support his family if he is to  
13 remain at liberty. Any custodial sentence in this case will have a devastating effect on the  
14 Berry family.

## 15           **II. TRIAL AND THE PRESENTENCE INVESTIGATION REPORT**

16           On December 15, 2016, defendant John Berry, III was found guilty of one count of bid  
17 rigging in violation of 15 U.S.C. § 1.

18           During the course of the trial cooperating co-conspirators testified that John Berry was  
19 the son-in-law and known employee of co-defendant Alvin Florida and acted on behalf of  
20 Florida's interests or the interests of Florida's clients. These witnesses confirmed that any  
21 payments made as a result of John Berry's participation in the rounds subsequent to the auctions  
22 were made directly to Florida. No evidence was ever presented that John Berry received any  
23 payment or shared in any ownership interests for any of the properties in question.

24           The cooperating witnesses described how John Berry took direction from Florida during  
25 the auctions and subsequent rounds either in person or via cell phone when Florida was not  
26 present. There were times that John Berry participated on his own during auctions and rounds  
27 but this was described as rare by cooperating witnesses and there was no evidence disputing the  
28 fact that he was acting on Florida's behalf at all times. The UCE and other witnesses testified

1 that they were approached by Florida employees about retaining the services of Florida. None  
 2 of these witnesses ever identified John Berry as the employee who approached them or ever  
 3 described John Berry explaining "the rules" to them with the solitary exception of the statement  
 4 to the UCE that he could tap Florida on the shoulder indicating he wished to participate in the  
 5 round.

6 When questioned under direct examination if John Berry participated in auctions and  
 7 rounds independently, B.R. stated that this was a rare situation because Florida or other  
 8 members of the Florida group were usually present. (Trial Transcript *hereinafter* TX pg. 478,  
 9 ll. 2-4) This was confirmed on cross-examination. (TX pg. 572 ll. 18-21)

10 Cooperating witness D.D. testified that he never once observed John Berry generate a  
 11 round sheet. (TX pg. 728, ll. 9-20) D.D. further testified that when his business group  
 12 reconciled with Florida he understood that no payments were ever made to John Berry and that  
 13 any payments made for the rounds that John Berry participated in were paid directly to Florida  
 14 and his interests alone. (TX pg. 729, ll. 2-23)

15 No evidence was produced from the government at trial that indicated John Berry  
 16 received any payment from Florida as a salary or commission for his participation in the  
 17 auctions or rounds. No evidence was produced that indicated John Berry took any ownership  
 18 interest in any of the properties in question.

19 The United States Probation Office has prepared a Presentence Investigation Report  
 20 (PSR). The Guidelines calculation in the PSR provides for an adjusted offense level of 15.  
 21 The PSR establishes a total criminal history score of zero and a Criminal History Category of I.  
 22 PSR at ¶55. Mr. Berry has no objection to the factual content of the PSR.

23 The Guidelines in this case call for a sentence of 18-24 months imprisonment. The PSR  
 24 recommends that Mr. Berry be sentenced to 6 months imprisonment, and 3 years of supervised  
 25 release, including standard conditions of supervised release. The PSR also recommends that  
 26 Mr. Berry pay \$105,999.05 in victim restitution. (PSR Sentencing Recommendation)

27 Mr. Berry fully endorses and adopts the PSR's careful analysis of his offense conduct,  
 28 but objects to the PSR's guidelines calculation and restitution recommendation. Mr. Berry

1 contends that a reduction for minor participant should be applied pursuant to U.S.S.G. §  
2 3B1.2(b) and that the adjustment under U.S.S.G. § 2R1.1(b) (volume of commerce) should be  
3 limited to the 1-point increase for bid-rigging because at all times Mr. Berry acted as Florida's  
4 agent. Thus, reducing his adjusted offense level to 11. In addition, Mr. Berry contends that  
5 there is no need for restitution in this case because the alleged losses are too speculative, and in  
6 any event the government has not satisfied their burden to establish the proper amount of  
7 restitution.

8 Mr. Berry respectfully submits that a 36-month term of probation conditioned upon 6  
9 months home detention, and community service is sufficient, but not greater than necessary to  
10 accomplish the sentencing goals as set forth in 18 U.S.C. § 3553(a).

### 11 III. BACKGROUND

12 John Berry has lived a blameless life prior to becoming involved with Alvin Florida.  
13 He was reared and educated in the Southeast United States. Despite an unstable family  
14 environment early on he found solace in sports and music. In 2000 he married Corine Berry.  
15 The marriage produced 3 children aged 6 years to 17 years. Mr. Berry is an active participant  
16 in the lives of his children.

17 John Berry was employed in the auto sales industry prior to 2007. In that year he lost  
18 his job and the family was forced to live on their savings. When those funds were exhausted  
19 the entire family moved in with his wife's step father, Alvin Florida. Florida provided a home  
20 and stability for the children. He then provided John Berry a chance to earn \$10.00 per hour  
21 working in his business. (PSR at ¶40 and attached letter from Corine Berry) John Berry  
22 naively accepted the job in a desperate attempt to provide for his family and get back on his  
23 feet.

24 Attached with this Sentencing Memorandum are letters from friend and family of John  
25 Berry. There is one resounding theme in virtually every letter: John Berry is a dedicated  
26 family man who provides for his family. This not only includes the requisite financial  
27 provisions, but also the support of a loving husband and father involved in the day-to-day  
28

1 activities of his children. That is the laudable goal that many modern parents strive for in this  
 2 day and age.

3 Finally, letters from the community reveal that John Berry is a spiritual man of  
 4 conscience and service. (*See attached letter from Pastor George Matthews of the Men of Valor*  
 5 *Academy*) John Berry has provided guidance and leadership to the youth of his community for  
 6 a number of years predating his involvement with Alvin Florida.

7 **IV. THE OFFENSE**

8 The PSR accurately summarizes Mr. Berry's offense conduct, but several aspects bear  
 9 additional emphasis here.

10 Significantly, the evidence at trial more than suggests that John Berry was a minor  
 11 participant in the conspiracy acting only as a paid employee and agent for Florida and his  
 12 interests. What the PSR investigation and letters from the family and community reveal is that  
 13 John Berry and his family were suffering a severe financial crisis and his actions were  
 14 consistent with a man struggling to avoid financial devastation.

15 **APPLICABLE SENTENCING LAW**

16 The landmark decision in *United States v. Booker*, 543 U.S. 220 (2005), changed  
 17 sentencing in the Federal Courts. *Booker* renders the Guidelines as advisory only, and instructs  
 18 the sentencing courts to consider the Guidelines in context of all of those factors enumerated in  
 19 18 U.S.C. § 3553(a). “Section 3553(a) remains in effect, and sets forth numerous factors that  
 20 guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in  
 21 determining whether a sentence is unreasonable.” *Booker*, 543 U.S. at 660-661.

22 The Supreme Court addressed the issue of the “presumption of reasonableness” of a  
 23 within Guidelines sentence in *Rita v. United States*, 551 U.S. 338 (2007), and instructed that a  
 24 within Guideline sentence is presumed reasonable only upon appellate review. The Court  
 25 stated:

26 We repeat that the presumption before us is an appellate court presumption.  
 27 Given our explanation in *Booker* that appellate “reasonableness” review merely  
 28 asks whether the trial court abused its discretion, the presumption applies only on  
 appellate review. The sentencing judge, as a matter of process, will normally

begin by considering the presentence report and its interpretation of the Guidelines. [Citations.] He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the “heartland” to which the Commission intends individual Guidelines, to apply, [citation], perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless. [Citation.] Thus, the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure. [Citations.] In determining the merits of these arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply. [Citation.]” *Id.* at 351.

Further, the Court instructed that, “The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. Even the Government concedes that the appellate courts may not presume that every variance from the advisory Guidelines is unreasonable.” *Id.* at 354. The Ninth Circuit reiterated this premise in *United States v. Edwards*, 595 F.3d 1004, 1015 (9th Cir. 2010), holding that a reviewing court cannot presume a sentence is substantively unreasonable only because it falls outside the range recommended by the Sentencing Commission.

The Ninth Circuit was heard on the presumption of reasonableness and directed that even on appeal the presumption of a Guideline sentence may not be reasonable. It stated that, “A court of appeals may not presume that a non-Guidelines sentence is unreasonable. Although a court may presume on appeal that a sentence within the Guidelines range is reasonable, [citation] we decline to adopt such a presumption in this circuit.” *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The Court in *United States v. Ressam*, 629 F.3d 793, 828 (9th Cir. 2012) (en banc), defined “substantive reasonableness”:

A substantively reasonable sentence is one that is sufficient, but not greater than necessary to accomplish §3553(a)(2)’s sentencing goals. The touchstones of “reasonableness” is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 USC §3553(a). In determining substantive reasonableness, we are to consider the totality of the circumstances, including the degree of variance for a sentence imposed outside the Guidelines range.

1           The Guideline range is simply the beginning of the analysis for sentencing, not the end.  
 2           The Ninth Circuit stated, “The Guideline’s factor may not be given more or less weight than  
 3           any other. So while the Guidelines are the starting point and initial benchmark and must be kept  
 4           in mind throughout the sentencing process, the Guideline’s range constitutes only a touch-stone  
 5           in the district court’s sentencing consideration.” *United States v. Autery*, 555 F.3d 864, 8172  
 6           (9th Cir. 2009) (internal quotation marks omitted).

7           The Court must now consider 18 U.S.C. § 3553(a) in its entirety and impose a sentence  
 8           “sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph  
 9           (2) of this subsection.” The court, in determining the particular sentence to be imposed, shall  
 10          consider –

- 12           (1) The nature and circumstances of the offense and the history and characteristics of  
               the defendant;
- 13           (2) The need for the sentence imposed –
  - 14           (a) to reflect the seriousness of the offense, promote respect for the law and  
               provide just punishment for the offense;
  - 15           (b) to afford adequate deterrence to criminal conduct;
  - 16           (c) to protect the public from further crimes of the defendant; and
  - 17           (d) to provide the defendant with needed education or vocational training,  
               medical care or other correctional treatment in the most effective manner
- 18           (3) the kinds of sentences available;
- 19           (4) the kinds of sentence and the sentencing range established for [the offense under the  
               Guidelines];
- 20           (5) any pertinent policy statement;
- 21           (6) the need to avoid unwarranted sentence disparities among defendants with similar  
               records who have been found guilty of similar conduct
- 22           (7) the need to provide restitution to any victims of the offense.

23           The sentencing court is now required to consider factors that the Guidelines effectively  
 24          prohibited from consideration (e.g., Age, USSG 5H1.1; Education and Vocational Skills,  
 25          USSG 5H1.2; Mental and Emotional Condition, USSG 5H1.3; Physical Condition Including  
 26          Drug or Alcohol Dependence, USSG 5H1.4; Employment, USSG 5H1.5; Family Ties and  
 27          Responsibilities, USSG 5H1.6; Socio-economic Status, USSG 5H1.10; Civic and Military  
 28          Contributions, USSG 5H1.11; and Lack of Youthful Guidance, USSG 5H1.12.) *United States*

1      *v. Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (en banc). To consider the “history and  
 2 characteristics of the defendant,” the Court must now consider factors the Guidelines eschewed.

3           Finally, the Supreme Court has cautioned that respect for the law is promoted in many  
 4 ways, not always measured by the strictness of sentences or the nature of harsh sanctions. The  
 5 Court stated:

6           Moreover, the unique facts of [defendant’s] situation provide support for the  
 7 District Judge’s conclusion that, in [defendant’s] case, a sentence of imprisonment  
 8 may work to promote not respect, but derision, of the law if the law is viewed as  
 9 merely a means to dispense harsh punishment without taking into account the real  
 10 conduct and circumstances involved in sentencing. *Gall v. United States*, 552  
 11 U.S. 38, 54 (2007) (internal quotation marks omitted).

12          In order to meet the mandate of the *Booker* remedy, then, this Court must calculate the  
 13 appropriate guidelines range and may consider appropriate departures or variances. It must  
 14 also apply the 3553(a) factors and address any other specific characteristics of the defendant or  
 15 his offense that might impact the determination of a “reasonable” sentence under the particular  
 16 circumstances of this case. The court must then consider the statutory parsimony provision and  
 17 impose a sentence sufficient, but not greater than necessary to comply with the purposes set  
 18 forth in §3553(a)(2). The District Court’s sentencing decision will then be subject to an abuse-  
 19 of-discretion review by the circuit. *United States v. Treadwell*, 593 F.3d 990, 999 (9th Cir.  
 20 2010) (reversal is appropriate only if district court’s sentence is “illogical, implausible, or  
 21 without support in inferences that may be drawn from facts in the record.”).

22          **A. Application of 2-Point Decrease In Offense Level for Minor Participant Under**  
 23          **U.S.S.G. § 3b1.2(b).**

24          A defendant is entitled to a 2-point decrease in offense level if the defendant was a  
 25 “minor participant” in the criminal activity. U.S.S.G. § 3B1.2(b). Application Note to  
 26 U.S.S.G. § 2R1.1 (bid-rigging) states that: “For purposes of applying § 3B1.2, an individual  
 27 defendant should be considered for a mitigating role adjustment only if he were responsible in  
 28 some minor way for his firm’s participation in the conspiracy.”

29          A “minor participant” is described as a defendant “who is less culpable than most other  
 30 participants in the criminal activity, but whose role could not be described as minimal.” *Id.*

1 *Sentencing Commission Application Note 5.* The Sentencing Commission has provided  
2 guidance for applying the minor participant adjustment. For example, a defendant who is  
3 accountable for a loss amount that greatly exceeds the defendant's personal gain from a fraud  
4 offense may receive a 2-point offense level reduction under this guideline. *Id. Sentencing*  
5 *Commission Application Note 3(A).* The application of this guideline is heavily dependent on  
6 the facts of the particular case, however the Court should consider:



As detailed above, John Berry's role in the offense meets all of the above criteria. Consequently, Mr. Berry was a minor participant in the offense and is entitled to a 2-point decrease in offense level.

**A. Application of U.S.S.G. § 2R1.1(b) Volume of Commerce.**

22 John Berry objects to the 2-level increase for volume of commerce. The PSR  
23 recommends a 2-level increase pursuant to U.S.S.G. §2R1.1(b)(1), "volume of commerce."  
24 PSR at ¶44. The guidelines provide that "the volume of commerce attributable to an individual  
25 participant in a conspiracy is the volume of commerce done by him or his principal in goods or  
26 services that were affected by the violation." U.S.S.G. 2R1.1(b)(2). Mr. Berry contends that  
27 he was not engaging in bid-rigging as an individual, but rather as an agent of Alvin Florida or  
28 as his principal. Mr. Berry was merely Florida's employee and as such the 2-level increase is

1 inapplicable. Mr. Berry had no decision-making power whatsoever and at all times was acting  
 2 on behalf of Florida as Florida's principal. The quoted language contained in the guideline  
 3 manifests the sentencing commission's understanding that the individual with decision-making  
 4 power (*i.e.*, the boss) is liable for his employee's actions. It would be unfair to increase Mr.  
 5 Berry's guidelines based upon the decisions of Alvin Florida—particularly since Mr. Berry was  
 6 an employee who presumably made the same amount of money regardless of the volume of  
 7 commerce affected by the offense.

8                   **V. A SENTENCE OF 36 MONTHS PROBATION, CONDITIONED UPON A TERM**  
 9                   **OF 6 MONTHS HOME DETENTION IS SUFFICIENT TO ACHIEVE THE GOALS**  
                  **OF SENTENCING IN THIS CASE**

10                  John Berry finds himself in this predicament as a result of his misguided, albeit  
 11 laudable, efforts to find financial stability in order to provide for his family and get back on his  
 12 feet. As a result of this conviction the Berry family now stands on the brink of financial ruin  
 13 once more. Should John Berry suffer a custodial sentence for any length of time he will lose  
 14 the opportunity he currently has with his employers to keep his job and stay on his feet. (*See*  
 15 *the attached letters from his superiors at Autocom Nissan East Bay*) Most importantly, his  
 16 family will be cast asunder and forced to rely on the charity of other family members who  
 17 reside in another far-away state. If the Court is inclined to order restitution in this matter, John  
 18 Berry is the only defendant who stands in a position to comply with that order as he is gainfully  
 19 employed.

20                  **A. The Offense Was An Aberration In An Otherwise Productive and Lawful Life.**

21                  The letters from his family and community prove that John Berry is a family man and  
 22 hard worker who has never been in trouble until he lost his job and found himself in a desperate  
 23 situation. As a result he became involved with a person he not only trusted, but also felt a blind  
 24 obligation to as a result of Alvin Florida taking the Berry family into his home. The letters  
 25 describe a man of character and strength who lovingly provided for and supported his family  
 26 through thick and thin. He remains that man of character and fortitude today. Given the  
 27 chance, he will continue to do so.

1                   **B. Mr. Berry Did Not Realize the Extent of Harm.**

2                   John Berry found himself in a sophisticated arena where he had neither experience nor  
 3 expertise. He operated at the behest and direction of Alvin Florida for an hourly wage. Trial  
 4 testimony reveals he was a known employee and acted under Florida's direction. There is  
 5 nothing in his background of employment or education that would suggest he had any notion of  
 6 how his actions had any effect on the economy. He was instructed to bid at auctions and the  
 7 associated rounds to obtain properties or payments for Florida and Florida's interests alone.

8                   **VI. THERE IS NO NEED FOR RESTITUTION IN THIS CASE**

9                   Restitution in the present case is discretionary. PSR ¶37. The Court need only consider  
 10 "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). Mr.  
 11 Berry contends that there is no need to provide restitution to the alleged victims, *i.e.*, Bank of  
 12 America; Black Knight Financial Services; CitiMortgage; HomeBridge Financial Services; J.P.  
 13 Morgan Chase Bank; MERSCORP Holdings, Inc.; Ocwen Loan Servicing, LLC; OneWest  
 14 Bank FSB; PLM Lender Services; Wells Fargo Bank; and U.S. Bank Home Mortgage (the  
 15 "Banks") because (1) neither the government nor the probation office has presented the Banks'  
 16 actual claims of loss or documentation in support of the Banks' claims of loss to Mr. Berry; (2)  
 17 the amounts claimed in the PSR with respect to each property assumes that the property would  
 18 have sold for the same amount but for the bid-rigging by Mr. Berry and his co-conspirators;  
 19 and (3) the amount listed in the PSR does not represent the actual loss suffered by the Banks for  
 20 the properties in which Mr. Berry was involved in the secondary auctions.

21                   In any event, even if the Court determines that there is a need to provide restitution to  
 22 the Banks in this case, the Court does not possess sufficient information to determine the cause  
 23 or amount of restitution owed to the Banks because the government and probation office have  
 24 not disclosed the methodology that was used to determine the losses attributable to Mr. Berry  
 25 or the underlying evidence upon which the government relied upon. If the Court determines  
 26 that restitution is appropriate in this case, Mr. Berry requests an evidentiary hearing on the  
 27 matter to determine whether the government has met its burden with respect to the actual  
 28 amount owed by Mr. Berry individually.

1       According to the PSR, Mr. Berry is liable for restitution in the amount of \$105,999.05.  
 2 PSR at ¶36. This amount is to be paid to the Banks that allegedly owned the foreclosed  
 3 properties that were the objects of secondary auctions between Mr. Berry and other co-  
 4 conspirators. The PSR calculates restitution based upon the “amount of payoffs for rounds that  
 5 the government was able to identify that Berry received on behalf of Alvin Florida.” *Id.* The  
 6 PSR provides a chart listing 68 properties that were allegedly purchased by a co-conspirator  
 7 during the secondary auctions. Mr. Berry is alleged to have participated in those rounds and to  
 8 have received payouts ranging from \$250 to \$13,052. Neither the government nor the  
 9 probation office allege that Mr. Berry kept any of these funds. Rather, Mr. Berry was merely  
 10 an agent or proxy of Alvin Florida and all payouts were paid, if at all, directly to Alvin  
 11 Florida.<sup>1</sup>

12       A defendant has a right under the Due Process Clause to notice and the opportunity to  
 13 challenge any information that may be used to deprive him of life, liberty or property at  
 14 sentencing, including victim impact statements and information provided by victims regarding  
 15 restitution. *Burns v. United States*, 501 U.S. 129, 137-83 38 (1991); *Gardner v. Florida*, 430  
 16 U.S. 349, 351, 358 (1977); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v.*  
 17 *Burke*, 334 U.S. 736, 741 (1948). This right is protected through various provisions of Rule 32  
 18 and Rule 26.2, which require notice in the presentence report; the opportunity to investigate,  
 19 object and present contrary evidence and argument to the probation officer; the opportunity to  
 20 file a sentencing memorandum and argue orally to the court; the opportunity for a hearing; the  
 21 right to obtain witness statements, to have witnesses placed under oath and to question  
 22 witnesses at any such hearing; and the right to have the court resolve any disputed matter. Fed.  
 23 R. Crim. P. 32(e)(2), (f), (g), (h), (i); Fed. R. Crim. P. 26.2(a)-(d), (f). These protections apply  
 24 to information about victim impact and restitution. *United States v. Rakes*, 510 F.3d 1280,  
 25 1285-86 (10th Cir. 2007); Fed. R. Crim. P. 32(d)(2)(B), (D); 18 U.S.C. § 3664(a), (b), (e).

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26       <sup>1</sup> The evidence at trial established that not all payouts relating to rounds were actually made.  
 27 Thus, without additional evidence that the payouts were actually made with respect to all 68  
 28 properties the government cannot meet their burden to establish that Mr. Berry is liable for the  
 restitution sought.

1 Restitution in this case is governed by 18 U.S.C. § 3664, which provides that in  
2 determining whether to order restitution and the amount of restitution, “the court shall consider  
3 the amount of the loss sustained by any victim as a result of the offense, the financial resources  
4 of the defendant, the financial needs and earning ability of the defendant and the defendant’s  
5 dependents, and such other factors as the court deems appropriate.” *United States v. Mills*, 991  
6 F.2d 609, 611 (9th Cir. 1993). In reviewing restitution orders, circuit courts require that “the  
7 district judge had at his disposal information bearing on the considerations enumerated in  
8 section 3664. [Citations] There must also be some indication that the judge gave thought to  
9 the relevant information.” *Id.*

10 The probation officer is required to include “information sufficient for the court to  
11 exercise its discretion in fashioning a restitution order.” 18 U.S.C.S. § 3664(a). This  
12 information includes “to the extent practicable, a complete accounting of the losses to each  
13 victim, any restitution owed pursuant to a plea agreement, and information relating to the  
14 economic circumstances of each defendant.” *Id.* In addition, “if the number or identity of  
15 victims cannot be reasonably ascertained, or other circumstances exist that make this  
16 requirement clearly impracticable, the probation officer shall so inform the court.” *Id.* Section  
17 3664 also provides that “Any dispute as to the proper amount or type of restitution shall be  
18 resolved by the court by the preponderance of the evidence. The burden of demonstrating the  
19 amount of the loss sustained by a victim as a result of the offense shall be on the attorney for  
20 the Government. The burden of demonstrating the financial resources of the defendant and the  
21 financial needs of the defendant’s dependents, shall be on the defendant. The burden of  
22 demonstrating such other matters as the court deems appropriate shall be upon the party  
23 designated by the court as justice requires.” 18 U.S.C. § 3664(e). Finally, “[i]f the court finds  
24 that more than 1 defendant has contributed to the loss of a victim, the court may make each  
25 defendant liable for payment of the full amount of restitution or may apportion liability among  
26 the defendants to reflect the level of contribution to the victim’s loss and economic  
27 circumstances of each defendant.”

28

1           Restitution is unnecessary here since it does not appear that the Banks have made a  
 2 claim to any of the alleged losses. Had the Banks done so, the probation office would have  
 3 notified the Court and the parties in the PSR.<sup>2</sup> The fact that the Banks have not made claims  
 4 when invited to do so by the probation officer under the notice requirements of 18 U.S.C. §  
 5 3664(d) supports the conclusion that there is little, if any need for restitution in this case.

6           The restitution amount alleged in the PSR is far too speculative. Essentially, the PSR  
 7 concludes that Mr. Berry is liable for some portion of restitution based upon the theory that the  
 8 payouts in the rounds equal the amount the winning bidder in the round would have paid at the  
 9 public auction. This theory has a certain logic to it, but it is purely speculative and not  
 10 supported by any evidence.

11          Finally, the restitution amount does not represent actual losses sustained by the Banks.  
 12 The evidence at trial established that the opening bids at the public auctions were set by the  
 13 Banks and represented the Banks' bid on the property. In other words, the Banks did not set  
 14 the opening bid based upon a number that would encourage public bidding, rather it was the  
 15 Banks' bid based upon the Banks' determination of the value of the property. In fact, the  
 16 Banks ended up purchasing over 80% of the foreclosed properties at the public auctions at the  
 17 opening bid price. Surely, if the Banks intended to encourage bidding wars to drive up the sale  
 18 price, then they would not have routinely set the opening bid at amounts that virtually  
 19 guaranteed that the Banks would end up with the winning bid.

20          All 68 properties listed in the PSR were purchased at public auction at prices above the  
 21 Banks' initial bid. Since the Banks set the initial bid based upon their own determination of  
 22 fair market value there was no actual loss to the Banks.

23          As stated above, if the Court determines that restitution is proper in this case Mr. Berry  
 24 respectfully requests an evidentiary hearing to determine whether the Banks themselves have  
 25 made any claims; the government's methodology in determining restitution; whether the  
 26 evidence produced by the government can sustain the government's burden; whether restitution

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27          <sup>2</sup> Counsel requested any documentation submitted to the government by the Banks in support of  
 28 the restitution claims. The government informed counsel that all loss-related documents had  
 been previously produced in discovery.

1 should be apportioned between co-defendants and co-conspirators in other cases; whether joint  
2 and several liability is appropriate; and, finally, which individuals should be held jointly and  
3 severally liable with respect to each of the 68 properties listed.

## 4 | VII. CONCLUSION

5 For the foregoing reasons, Mr. Berry respectfully asks the Court to impose a sentence of  
6 36 months probation, conditioned upon 6 months home detention, and community service and  
7 find that such a sentence is sufficient, but not greater than necessary to accomplish the  
8 sentencing goals of 18 U.S.C. § 3553(a).

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Respectfully submitted,

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12 | DATED: April 12, 2017

By: /s/ John D. Forsyth  
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JOHN LEE BERRY, III

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